89-692

In The

Supreme Court of the United States

October Term, 1989

BIG APPLE INDUSTRIAL BUILDINGS, INC., AROL I. BUNTZMAN and MARTIN WILLIAM HALBFINGER, ESQ.,

Petitioners,

vs.

THE PROCTER & GAMBLE COMPANY and RIVERVIEW PRODUCTIONS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. What constitutes a "pattern of racketeering activity" under RICO, 18 U.S.C. §§ 1961-1968; did Congress intend the Second Circuit's view that an alleged undertaking to defraud one customer in the performance of a single, finite construction project, and more generally that any allegation of multiple related acts separated in time, is enough to establish the continuity required by the "pattern" element of a RICO claim?

2. Is RICO, 18 U.S.C. §§ 1961-1968, unconstitutionally vague, on its face or as applied here?

LIST OF PARTIES TO THE ACTION

The parties to this action were as follows:

The Proctor & Gamble Company and Riverview Productions, Inc.; Plaintiffs-Appellants and Big Apple Industrial Buildings, Inc., Arol I. Buntzman, Martin William Halbfinger, Esq., George A. Fuller Company, The Arkhon Corporation, Haines Lundberg Waehler and John Does 1-10; Defendants-Appellees.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit rendered June 22, 1989, rehearing denied July 31, 1989.

OPINION BELOW

The panel opinion of the Court of Appeals denying a

rehearing or *en banc* rehearing is unreported (App. 22a). The opinion of the panel of the Court of Appeals is reported at 879 F.2d 10. The opinion of the district court is reported at 655 F. Supp. 1179 (S.D.N.Y. 1987).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was dated and entered on June 22, 1989 (App. 1a). The opinion denying a rehearing was dated and entered on July 31, 1989 (App. 23a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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1. Jurisdiction in the district court was founded upon 28 U.S.C. § 1331.

The relevant parts of 18 U.S.C. §§ 1961-1968 are:

§ 1961. Definitions.

As used in this chapter —

(1) "racketeering activity" means . . . any act which is indictable under any of the following provisions of Title 18, United States Code: . . . . section 1341 (relating to mail fraud), ...

* * *

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

§ 1962. Prohibited activities.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

STATEMENT OF THE CASE

Petitioners seek review of the decision of the Second Circuit reinstating a complaint against them for damages under the Racketeering Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961, *et seq.* The District Court dismissed the complaint on the ground that "an undertaking by a contractor engaged in a lawful enterprise to bilk one customer in one construction project of finite duration and scope does not satisfy the 'continuity' element of a pattern of racketeering." *Procter & Gamble Co. v. Big Apple Industrial Buildings, Inc.*, 655 F. Supp. 1179, 1182 (S.D.N.Y. 1987) (Leval, J.). The District Court concluded that dismissal was warranted even if the customer was bilked "by repeated fraudulent assertions." *Id.*

In a two to one decision, a panel of the Court of Appeals reversed, holding, based on *Beauford v. Helmsley*, 865 F.2d 1386 (2d Cir. 1989) (*en banc*), *vacated and remanded*, 109 S. Ct. 2983 (July 3, 1989), *upheld by order*, ____ F.2d ____ (2d Cir. Sept. 15, 1989) that " 'continuity' means that separate events occur over time and perhaps threaten to recur, while 'relatedness' means — given that different acts of racketeering activity have occurred — that there is a way in which the acts may be viewed as having a common purpose" (879 F.2d at 17), and concluding that "the spectre of continuity of criminal offenses in the pattern of activity is sufficiently pleaded to withstand dismissal at this stage of the litigation." *Id.* at 18.

In dissent, Judge Winter observed, "I fear that my colleagues have adopted a test that may turn out to be no line at all. If, for example, a lumber yard selling to the Riverview project were to deliver five loads of lumber in each of which one two-by-four was missing and then mail five bills for the full amount, a civil RICO claim could be alleged under their theory." *Id.* at 20.

This decision was rendered on June 22, 1989, during the pendency in this Court of *H.J. Inc. v. Northwestern Bell Telephone Co.* Subsequently, *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (June 26, 1989) was decided, and, within a week, *Beauford*, a decision upon which the Second Circuit panel relied, was vacated and remanded for further consideration in light of *H.J. Inc. Beauford v. Helmsley*, 109 S. Ct. 2983 (July 3, 1989). On September 15, 1989, the Second Circuit adhered to its *en banc* decision.

STATEMENT OF FACTS

This case arose out of an agreement to build television studios in New York City (the "Project"). Pursuant to the agreement, plaintiffs were obligated to pay the entire construction cost of the Project. Big Apple Industrial Buildings, Inc. ("Big Apple") was the owner of the property on which the studios were to be built. Arol I. Buntzman and Martin William Halbfinger, Esq. were respectively owner of and an attorney for Big Apple.

Plaintiffs alleged that petitioners made a number of material misrepresentations during the course of the Project with respect to expertise, cost estimates, and actual costs, and that they diverted funds. As predicate acts, plaintiffs alleged *inter alia* that Buntzman sent letters and documents beginning on or about March 20, 1984 and mailed a contract to plaintiff Riverview on or about May 15, 1985. Those predicate acts ceased by April 28, 1986. As the "enterprise," plaintiffs alleged an association in fact of Buntzman and Halbfinger.

REASON FOR GRANTING THE WRIT

This case is particularly "certworthy" because *H.J. Inc.* rejected the multiple schemes requirement in the Eighth Circuit but left open the definition of the term "pattern" — an important issue of federal law which should be decided by this Court. In particular, *H.J. Inc.*, in holding that the predicate acts must "amount to or pose a threat of continued criminal activity" (109 S. Ct. 2893, 2900), did not resolve whether "acts directed at a small number of related commercial entities capable of quickly learning the true facts" (879 F.2d at 19) can be said to have the continuity required by the "pattern" element.

The need to provide content to the "pattern" requirement is brought into particularly sharp focus because of Judge Leval's and Judge Winter's determination of a lack of continuity. Judge Oakes' dissent in *Beauford* in which he stated that the *en banc* majority had failed "to accept the Supreme Court's invitation to 'develop a meaningful concept of "pattern," ' " citing *Sedima SPRL v. Imrex Co.*, 473 U.S. 479, 500; and Justice Scalia's concurring opinion in *H.J. Inc.* which states that the "pattern" element "was meant to import some requirement beyond the mere existence of multiple predicate acts." (109 S. Ct. at 2909). The Second Circuit panel's decision does not require more than the mere existence of multiple acts. In short, this case with its lack of indicia of continuity — (a) one project, (b) with a finite duration and scope, (c) in which the sole alleged victims are two related corporations, and (d) in which the racketeering acts alleged were "inherently self-limiting," (879 F.2d at 19) — presents an excellent vehicle for a full definition of the "pattern" requirement.

This case is also "certworthy" because it sharply presents the constitutional question raised by the uncertainty regarding the conduct that constitutes a "pattern" within the meaning of

the RICO statute.[2] As Justice Scalia stated, the "Court's only substantive contribution to [its] prior guidance [regarding the "pattern" element] . . . is a contribution that makes it more rather than less difficult for a potential defendant to know whether his conduct is covered by RICO." *H.J. Inc.*, 109 S. Ct. at 2908. Thereafter, Justice Scalia stated:

> RICO, since it has criminal applications as well, must even in its civil applications, possess the degree of certainty required for criminal laws, *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954). No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.

109 S. Ct. at 2909.

As this Court held in *Colautti v. Franklin*, 439 U.S. 379 (1979):

> It is settled that, as a matter of due process, a criminal statute that 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute' . . . is void for vagueness.

In *Smith v. Goguen*, 415 U.S. 566 (1973), after noting that the vagueness doctrine incorporated notions of fair notice or warning, this Court stated:

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2. Pursuant to Supreme Court Rule 28 it is noted that 28 U.S.C. § 2403 may be applicable.

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, violates the first essential of due process of law.

Id. at 572 n.8.

In *H.J. Inc.*, this Court has, in Justice Scalia's words, been able to come up with only "meager guidance" (109 S. Ct. at 2909) with respect to the meaning of the "pattern" element of RICO. This Court should then determine the constitutional issue of whether the RICO statute is facially void for vagueness because the "pattern" element is incompatible with due process in that the "pattern" element requires that persons "of common intelligence must guess at its meaning and differ as to its application", and fails to give fair notice of what conduct is forbidden.

In the alternative, this Court should determine whether RICO is void for vagueness as applied to the instant case, in which petitioners had no fair notice as to whether their alleged conduct constituted a "pattern of racketeering". The lack of notice is clear here since Judge Leval found the conduct not to be a pattern (655 F. Supp. at 1182), and Judge Winter stated, "I have no hesitation in labelling the conduct here 'isolated,' " and concluded that no threat of continuing activity existed. (879 F.2d at 20).

Moreover, Judge Cardamone, writing for the panel majority, implicitly acknowledged that Judge Leval was correct in finding no continuity under the pre-*Beauford* law which governed when Judge Leval's decision was rendered (879 F.2d at 18), and thus when the challenged conduct took place. Therefore, with respect to the vagueness doctrine, it is clear that petitioners herein not only would have had to guess at an unclear meaning of the

"pattern" requirement of RICO, but would have had to predict a future change in the controlling interpretation of "continuity."

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 37 — August Term 1987

(Argued September 18, 1987 Decided June 22, 1989)

Docket No. 87-7324

THE PROCTER & GAMBLE COMPANY and RIVERVIEW PRODUCTIONS, INC.,

Plaintiffs-Appellants,

v.

BIG APPLE INDUSTRIAL BUILDINGS, INC., AROL I. BUNTZMAN, MARTIN WILLIAM HALBFINGER, ESQ., GEORGE A. FULLER COMPANY, THE ARKHON CORPORATION, HAINES LUNDBERG WAEHLER, and JOHN DOES 1-10,

Defendants-Appellees.

Before:

CARDAMONE, WINTER and MINER
Circuit Judges

Procter & Gamble Co. and Riverview Productions, Inc. appeal from the March 20, 1987 judgment of the United States District Court for the Southern District of New York (Leval, J.)

dismissing their complaint alleging a violation of RICO, 18 U.S.C. §§ 1961-1968, against Big Apple Industrial Buildings, Inc., Arol Buntzman, Martin Halbfinger, Esq., George A. Fuller Co., and John Does 1-10 and dismissing various state law claims against the Arkhon Corporation and Haines Lundberg Waehler.

Reversed and remanded.

Judge Winter dissents in a separate opinion.

HAROLD P. WEINBERGER, New York, New York (David S. Frankel, Kramer, Levin, Nessen, Kamin & Frankel, New York, New York, of counsel), *for Plaintiffs-Appellants.*

ROBERT POLSTEIN, New York, New York (Anthony J. Ferrara, Polstein, Ferrara & Campriello, New York, New York, of counsel), *for Defendants-Appellees Big-Apple Industrial Buildings, Inc., Arol I. Buntzman and Martin William Halbfinger, Esq.*

RAY GODDARD, New York, New York (Robert J. Miletsky, Max E. Greenberg, Cantor & Reiss, New York, New York, of counsel), *for Defendant-Appellee George A. Fuller Company.*

MARTIN I. SHELTON, New York, New York (Shea & Gould, New York, New York, of counsel), *for Defendant-Appellee The Arkhon Corporation.*

THOMAS J. McGOWAN, Uniondale, New York (Frank L. Amoroso, Rivkin, Radler, Dunne & Bayh, Uniondale, New York, of counsel), *for Defendant-Appellee Haines Lundberg Waehler.*

Appendix A

CARDAMONE, Circuit Judge:

In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985), the Supreme Court challenged Congress and the lower federal courts to develop a "meaningful concept" of the quintessential insignia of violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) — "pattern of racketeering activity." The Court provided some instruction in its oft-quoted footnote 14. *Id.* at 496. The problem is of serious consequence because a RICO trial often becomes a "megatrial" with large numbers of unrelated defendants — charged with unconnected wrongs — tried together under the rubric of a single conspiracy. A RICO conviction subjects a defendant to a possible 20-year prison term and a fine of $25,000. 18 U.S.C. § 1963(a). In two recent cases considered and decided *en banc*, we accepted the Supreme Court's challenge. *See Beauford v. Helmsley*, 865 F.2d 1386 (2d Cir. 1989) (*en banc*); *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989) (*en banc*).

The present appeal was argued a considerable time ago on September 18, 1987. Decision has been delayed awaiting the resolution of the two above *en banc* cases that were decided on January 13, 1989. Subsequently, the parties, at our suggestion, ebriefed the instant appeal in March 1989 in light of *Beauford* and *Indelicato*.

BACKGROUND

The facts alleged in plaintiffs' complaint relate to the lease and construction of the "Riverview Studio Complex," a high-tech television and motion picture production facility. In 1983, plaintiff the Procter & Gamble Company (P&G) and its advertising agency D'Arcy Masius Benton & Bowles,Inc. (Benton & Bowles)

began looking for new studio space for the production of P&G's three soap operas. After considering at least eight sites in the New York metropolitan area, their search settled on the Washburn Wire Factory, an abandoned manufacturing plant located in Manhattan between East 116th and 119th Streets and owned by defendant Big Apple Industrial Buildings, Inc. (Big Apple). Defendant Arol Buntzman, president of Big Apple, and his attorney, defendant Martin W. Halbfinger, approached P&G with a plan to convert the factory into a state-of-the-art production complex, misrepresenting Big Apple's experience and expertise in conducting major renovation projects and exaggerating the completed site's potential as a tourist attraction.

During the course of negotiations beginning in the spring of 1984 Buntzman repeatedly stated that "hard" construction costs would not exceed $18 million and that the total project would cost approximately $25 million. The $18 million figure was supported by a letter Buntzman had received from the proposed general contractor, defendant George A. Fuller Co. (Fuller), estimating actual construction costs at $17,612,000. It later turned out that Fuller made this estimate simply by multiplying costs per square foot of comparable projects by the subject project's approximate square footage. Fuller did not determine actual construction costs based upon plans and specifications for building the project on this site. Hence, the estimate was unrealistic.

In January 1985, plaintiff Riverview Productions, Inc. (Riverview) — a wholly-owned subsidiary of Benton & Bowles formed to act for P&G in the studio project and whose obligations P&G guaranteed — entered into a ten-year lease and lease guaranty with Big Apple. The lease was for the three as yet unbuilt studios — the Riverview Studio Complex — at an annual rental of $1.2 million, plus Big Apple's annual debt service, including

amortization over ten years of a loan for the entire construction cost of the project. As the transaction was originally structured, Big Apple as owner was to obtain a construction loan based on P&G's lease guaranty, but P&G and Riverview were to have no further role in securing construction financing.

Nonetheless, because Big Apple had difficulty obtaining a construction loan, it asked P&G to guarantee the loan. P&G initially refused. Meanwhile, Riverview was pressing Big Apple for more precise cost estimates. Plaintiffs allege that when Fuller conducted a more thorough cost survey and placed "hard" construction costs in the vicinity of $40 million, Big Apple squelched this estimate and hired an outside consultant who — on the basis of inaccurate information — computed "hard" costs at $22.7 million. At that time, Buntzman as head of Big Apple assured P&G and Riverview that their resulting calculation of $30-35 million for the project's total cost was too high. On the basis of the new $22.7 million "hard" cost figure, P&G eventually agreed to guarantee the construction loan.

In a June 6, 1985 "Tri-Party Agreement" between P&G, Riverview, and Big Apple, P&G agreed to guarantee financing up to $25 million to be provided by Citibank N.A. ($22 million in "hard" costs, $3 million in "soft" costs). The $25 million limit was reached in early 1986. Thereafter, P&G extended its guaranty on a requisition-by-requisition basis until April 1986, when the loan totalled $32 million. Throughout the months of financing, Big Apple continued to mislead plaintiffs regarding the Riverview Studio Complex's actual costs and to conceal the second, more accurate Fuller estimate.

On May 2, 1986 plaintiffs P&G and Riverview filed a complaint asserting various state law causes of action for fraud

and conversion as well as violation of the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986). The RICO defendants are Big Apple, Halbfinger, Buntzman, and Fuller. Plaintiffs' claims against Haines Lundberg Waehler, an architectural, engineering, and planning firm, allege essentially architectural malpractice; plaintiffs charge the Arkhon Corporation, a construction manager of building projects, with breach of its management contract and of an implied warranty. Plaintiffs seek treble damages based on the RICO violations and rescission of the Lease, the Lease Guaranty, and the Tri-Party Agreement.

In addition to alleging that the RICO defendants fraudulently convinced plaintiffs to lease and guarantee financing for the studio complex, plaintiffs accuse the RICO defendants of repeated illegal siphoning of project funds. Plaintiffs allege that Big Apple improperly and excessively requisitioned millions of dollars over a nine-month period, including $657,000 in fees and disbursements to Halbfinger for 13 months' legal services, a $625,000 construction manager's fee to defendant Arkhon Corporation, and other excessive, duplicative, or unauthorized expenditures. Moreover, defendants Big Apple and Halbfinger are claimed to have fraudulently abused escrow accounts by inflating requisitions in order to "cushion" them against the possibility that plaintiffs would detect their fraud. Finally, plaintiffs contend that defendants repeatedly and falsely blamed P&G and Riverview for construction delays so that they could justify charging "interim rent" for unproductive periods.

On motions to dismiss the complaint under Fed. R. Civ. P. 9(b), 12(b)(1), and 12(b)(6), Judge Leval of the United States District Court for the Southern District of New York ruled that the alleged racketeering activity was not sufficiently continuous

or related to constitute a RICO violation. Because the RICO claim was the only basis for federal jurisdiction, Judge Leval dismissed the complaint without prejudice to permit repleading of the state law claims in an appropriate forum. *Procter & Gamble Co. v. Big Apple Indus. Buildings, Inc.*, 655 F. Supp. 1179 (S.D.N.Y. 1987). From the dismissal of their complaint, plaintiffs appeal. We now reverse and reinstate the RICO complaint.

DISCUSSION

As part of the Organized Crime Control Act of 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968) (RICO or the Act), to combat the infiltration into and corruption of America's legitimate business community by organized crime. *Id.* § 1, 84 Stat. at 943 (statement of findings and purpose). The Act's substantive provisions are contained in § 1962, which outlaws the use of income "derived . . . from a pattern of racketeering activity" to acquire an interest in establish, or operate an enterprise engaged in or affecting interstate commerce (subdivision (a)); the acquisition or maintenance of any interest in or control of such an enterprise "through a pattern of racketeering activity" (subdivision (b)); the conduct or participation "in the conduct of such enterprise's affairs through a pattern of racketeering activity" (subdivision (c)); and conspiring to do any of the above (subdivision (d)). 18 U.S.C. § 1962. Those activities that congress sought to prohibit are contained in 18 U.S.C. § 1962 set forth in the margin.[1] Reading subdivisions (a), (b) and (c) of that section makes it clear that a valid RICO charge must allege the existence of both an enterprise and a pattern of racketeering activity.

[1] In their complaint, plaintiffs refer to § 1962(b), (c), and (d).

We agree with the district court that the facts alleged relate only to § 1962(c), and possibly to conspiracy under subdivision (d) to violate subdivision (c). *See United States v. Turkette*, 452 U.S. 576, 584 (1981) (§ 1962(b) addresses organized crime's infiltration of legitimate business enterprises); *United States v. Parness*, 503 F.2d 430, 438-39 (2d Cir. 1974) (acquiring casino hotel by twice transporting stolen cashier's checks violates § 1962(b)), *cert. denied*, 419 U.S. 1105 (1975).

On this appeal, we are asked whether the facts alleged are sufficient as a matter of law to support plaintiffs' claim that the defendants' conduct formed such a pattern of racketeering activity in violation of § 1962. Taking all of the allegations of plaintiffs' complaint as true, we conclude that a RICO claim was sufficiently pleaded and that a reasonable trier of fact could have found a pattern of racketeering activity. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). Our reasons follow.

I Elements of a RICO Claim: "Enterprise" and "Pattern of Racketeering Activity"

To state a § 1962(c) claim plaintiffs must allege the conduct of an enterprise through a pattern of racketeering activity. *Sedima*, 473 U.S. at 496; *see Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984). A pattern of racketeering activity is a series of *criminal acts* as defined in § 1961(1), and the enterprise is generally a *group of persons* associated together for a common purpose of engaging in a course of conduct. *Sedima*, 473 U.S. at 496; 18 U.S.C. § 1961(4) (defining "enterprise" as including "any individual, partnershaip

corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity"). Evidence of an ongoing organization, the associates of which function as a continuing unit, suffices to prove an enterprise. *Turkette*, 452 U.S. at 583.

Congress' definition of the RICO pattern of racketeering activity differs from its other RICO definitions; that is, the statute declares that most of the other terms "mean" something, *see, e.g.*, § 1961(1) & (2), while it also provides that " 'pattern of racketeering activity' *requires at least* two acts of racketeering activity, . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (emphasis added). This "at least" language in the definition suggests that though two predicate acts must be present at a minimum to constitute a pattern, two acts alone will not always suffice to form a pattern. *See Sedima*, 473 U.S. at 496 n.14 ("The implication is that while two acts are necessary, they may not be sufficient."); *Indelicato*, 865 F.2d at 1382 ("The legislative history is . . . inconsistent with a rule that any two acts of racketeering activity, without more, suffice to establish a RICO pattern.").

In *Sedima*, the Supreme Court discussed the legislative history of the pattern requirement:

> As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No.

91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship . . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern . . . . " 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665.

473 U.S. at 496 n.14. The Court later noted the need for lower federal courts "to develop a meaningful concept of 'pattern.' " *Id.* at 500.

In sum, when facing a RICO count in an indictment or complaint, a district court must determine whether it independently alleges both an enterprise — a group of persons in an ongoing association — and a pattern of racketeering activity — a series of allegedly criminal acts. Further, for a pattern to exist, the alleged criminal acts should be characterized by their relatedness and continuity. An enterprise may be sufficiently alleged, but if a pleading does not indicate the existence of both components of the pattern of racketeering activity, a RICO claim should be dismissed. *See Indelicato*, 865 F.2d at 1383 (noting that these concepts are not rigid, and that "[t]he nature of the enterprise may also ser e to show the threat of continuing activity"). We turn to an examination of the concepts of continuity and relatedness.

II Continuity and Relatedness

A. *Continuity*

In the wake of *Sedima*, other courts have interpreted

"continuity" in footnote 14 to require plaintiffs to allege multiple schemes in order to establish a pattern of racketeering activity. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 829 F.2d 648, 650 (8th Cir. 1987) ("A single fraudulent effort or scheme is insufficient."), *cert. granted*, 108 S. Ct. 1219 (1988); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154 (4th Cir. 1987) (requiring multiple criminal episodes to demonstrate continuity); *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986) (holding that defendants' actions in converting liquid petroleum gas failed to show sufficient continuity because they "comprised one continuing scheme to convert gas from Superior Oil's pipeline"); *Northern Trust Bank/O'Hare N.A. v. Inryco, Inc.*, 615 F. Supp. 828, 832 (N.D. Ill. 1985) ("It is difficult to see how the threat of continuing activity . . . could be established by a single criminal episode."). *But see California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1469 & n.1 (9th Cir. 1987) (rejecting "multiple episode" requirement), *cert. denied*, 108 S. Ct. 699 (1988); *Bank of America Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986) (rejecting defendants' argument that predicate acts must occur in different criminal episodes and holding that nine acts of wire and mail fraud involving the same parties over a three-year period in the course of single scheme satisfy the pattern requirement); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985) (complaint alleging that defendants twice mailed fraudulent invoices satisfied pattern requirement because the alleged acts were related).

We have explicitly eschewed any multiple scheme or episode requirement to demonstrate the continuity of the pattern of racketeering activity. *Indelicato*, 865 F.2d at 1383. Noting that the statutory definition of racketeering activity was cast in terms of "acts" or "offenses," without mention of schemes, episodes,

or transactions, we concluded that Congress did not mean "to exclude from the reach of RICO multiple acts of racketeering simply because they achieve their objective quickly or because they further but a single scheme." *Id.* Thus, continuity may be demonstrated in various ways, such as from the nature of the enterprise, as in *Indelicato*, or from the sheer number of predicate acts over several years, or from the number of schemes. As we said in Beauford, "[w]hat is required is that the complaint plead a basis from which it could be inferred that the acts . . . were neither isolated nor sporadic." 865 F.2d at 1391.

B. *Relatedness*

We next consider the concept of relatedness. In *Sedima*, the Supreme Court suggested that congress' definition of "pattern" in a later provision of the Organized Crime Control act of 1970, 18 U.S.C. § 3575(e) (1982), *repealed by* Sentencing Reform act of 1984, Pub. L. No. 98-473, tit. II, §§ 212(a)(2) and 235(a)(1), 98 Stat. 1987, 2031, might illuminate the meaning of the pattern of racketeering activity requirement of § 1962. *See Sedima*, 473 U.S. at 496 n.14 (citing *Iannelli v. United States*, 420 U.S. 770, 789 (1975)). Section 3575(e) appears to be especially helpful in construing the requirement of a "relationship" among racketeering acts: "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e) (quoted in *Sedima*, 473 U.S. at 496 n.14). In *Indelicato* we set forth a non-exclusive elaboration of § 3575(e). A pattern may be found, for example, from an examination of the interrelationship between acts including similarity of goals, methods of their accomplishment, repetitiousness, and closeness of temporal proximity. *See* 865 F.2d at 1382.

We have, moreover, used these factors to evaluate an appellant's claim that there was insufficient evidence to support a jury's finding that a RICO pattern existed. *See United States v. Teitler*, 802 F.2d 606 (2d Cir. 1986). There, appellants were attorneys accused of defrauding insurance companies by creating false documents and encouraging clients to commit perjury in order to inflate the value of automobile accident claims. *Id.* at 608-09. Finding "ample evidence of a pattern of wrongdoing, we affirmed a RICO conviction on two charges of mail fraud, finding that "the evidence showed that both of the acts of racketeering charged against the appellant had a similar purpose, namely, defrauding insurance companies; both shared similar success in defrauding such companies; both shared similar participants and similar victims; and both employed similar methods." *Id.* at 612. The question that must always be answered, therefore, is whether a complaint adequately alleges facts from which it may be inferred that the predicate acts are interrelated, using the above factors as indications of relatedness.

C. *Summary of Continuity and Relatedness*

For the purposes of RICO, "continuity" means that separate events occur over time and perhaps threaten to recur, while "relatedness" means — given that different acts of racketeering activity have occurred — that there is a way in which the acts may be viewed as having a common purpose. These concepts are separately compartmentalized for analytic purposes, largely to ensure that the wrongful activity alleged is neither sporadic nor isolated, and that the acts have similar or common purpose and direction. The Supreme Court instructs that "[w]hile the proof used to establish these separate elements [of enterprise and pattern] may in particular cases coalesce, proof of one does not necessarily establish the other." *Turkette*, 452 U.S. at 583. Ordinarily, proof

of these concepts of continuity and relatedness in the pattern will vary in each case.

Our decisions in *Indelicato* and *Beauford* are illustrative. In the former, proof of the purpose and nature of the RICO *enterprise*, combined with the character of the offenses charged, satisfied the requirement of continuity because it tended to prove a threat of ongoing RICO activity. *Indelicato*, 865 F.2d at 1383, 1384-85. The predicate acts — three assassinations of rival Cosa Nostra family leaders — occurred with virtual simultaneity. Yet, despite the seemingly finite duration of the predicate acts, the threat of continuity clearly existed in view of the RICO enterprise and its obvious drive for greater wealth and power. *Id.* at 1384-85; *see also United States v. Watchmaker*, 761 F.2d 1459 (11th Cir. 1985) (virtually simultaneous shootings of three police officers satisfied RICO pattern requirement for member of the Outlaw Motorcycle Club), *cert. denied*, 474 U.S. 1100 (1986).

In *Beauford*, "the nature of the enterprise [did] not of itself suggest that the racketeering acts [would] continue." 865 F.2d at 1391. The continuity or threat of continuity necessary to adequately allege a RICO pattern was found by focusing on factors other than enterprise. *Id.* Plaintiffs alleged that when seeking to convert a large apartment complex into condominium units, defendants mailed to thousands of tenants and prospective buyers an offering plan that contained material misrepresentations and omissions amounting to fraud. Their allegations of more than 8,000 acts of mail fraud — all directed toward the common goal of inflating profits from the conversion — satisfied the relatedness requirement. *Id.* at 1392. We found the necessary continuity or threat of continuity in the assertions in plaintiffs' complaint that a large percentage of apartments were as yet unsold, the offering plans had been amended, and further amendments were likely,

The pleadings thus sufficiently alleged the basic requirements of a RICO cause of action. *Id.*

III Analysis of Instant Complaint

We therefore turn to an analysis of the plaintiffs' complaint in light of the above discussed concepts. The district court characterized the RICO complaint as alleging "a scheme by a contractor to bilk its customer as to a construction project." 655 F. Supp. 1179, 1182 (S.D.N.Y. 1987). It found that the necessary element of continuity was lacking principally because the "single, finite project" was not of a continuing nature, without "continuing criminal objectives" — notwithstanding the allegations in the complaint of five separate fraudulent episodes. Thus, the district court judge focused on the element of *enterprise*, relying understandably on the now-rejected view expressed in *United States v. Ianniello*, 808 F.2d 184, 191 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987). *See Indelicato*, 865 F.2d at 1382 (discussing *Ianniello*). Concluding that defendants were "engaged in a single lawful project of finite scope and duration," the district judge dismissed the RICO cause of action despite "[a]llegations of numerous instances of fraud." 655 F. Supp. at 1184.

Subsequent to Judge Leval's ruling, of course, we have held explicitly that "relatedness and continuity are essentially characteristics of [the pattern of racketeering] activity rather than of enterprise." *Indelicato*, 865 F.2d at 1382; *see also Beauford*, 865 F.2d at 1391. Moreover, we have rejected any need to allege multiple schemes. *See Beauford*, 865 F.2d at 1391. In this Circuit, a RICO claim may be adequately pleaded without an allegation of "an ongoing scheme having no demonstrable ending point." *Id.* Again, the complaint must provide allegations sufficient to infer that an enterprise exists, and that the acts of racketeering were neither isolated nor sporadic.

Against this standard it is clear that plaintiffs alleged an adequate and colorable cause of action under RICO. Their complaint plainly asserts the existence of a RICO enterprise or "group of persons associated together for a common purpose of engaging in a course of conduct" which functioned then as a "continuing unit." *See Turkette*, 452 U.S. at 583. A pattern of racketeering activity may be discerned from the facts alleged in plaintiffs' 77-page complaint. It claims that defendants engaged in at least five separate fraudulent schemes: (1) inducing execution of the ten-year studio lease by fraudulently misstating their experience, expertise, and construction cost estimates; (2) inducing plaintiffs to continue with the project, and inducing P&G to guarantee construction financing by fraudulently misrepresenting and concealing costs; (3) fraudulently diverting construction funds and charging excessive professional and other fees; (4) improperly escrowing construction loan funds to build a "cushion" against discovery of the alleged fraud; and (5) fraudulently scheming to collect "interim rent" for delays primarily caused by defendants.

These violations of the Federal Mail Fraud Act, 18 U.S.C. §§ 1341-1343 (1982), resulting from written and oral misrepresentations as to defendants' expertise, as to construction costs, and from sending false and excessive invoices and certifications over a period of nearly two years, are not isolated or sporadic actions. *See Beauford*, 865 F.2d at 1391-92. While multiple schemes are not essential for demonstrating continuity or a threat of continuity, here it is alleged that defendants conducted fraudulent business activities on a number of fronts in five separate schemes. Our dissenting colleague's characterization of this conduct as "isolated", and his attempt to draw a line that limits civil RICO to those cases where the threat of continuing activity "truly exists" apparently ignores the fact that the instant litigation is only at the pleading stage. Whether

defendants' actions are continuing in nature or isolated or sporadic will be the subject of proof at trial. The accepted-as-true allegations in the complaint refute the view that defendants' fraudulent actions towards plaintiffs were unrelated or disconnected. Hence, the spectre of continuity of criminal offenses in the pattern of activity is sufficiently pleaded to withstand dismissal at this stage of the litigation. *See Sedima*, 473 U.S. at 496 n.14; *Beauford*, 865 F.2d at 1391-92.

Finally, the complaint sufficiently alleges the relatedness between predicate acts to demonstrate a pattern. The alleged acts had the same purpose, that is, fleecing the same victims — P&G and Riverview — and employing similar unlawful methods of commission — namely, the misrepresentation of Big Apple's experience, of construction costs and the padding of billings to plaintiffs. *See delicato*, 865 F.2d at 1383. Consequently, the pleading satisfied the basic elements of a RICO cause of action by alleging the conduct of that enterprise through a pattern of racketeering activity, and that the pattern was characterized by the relatedness and continuity of the underlying criminal acts.

CONCLUSION

The judgment of the district court is accordingly reversed, the complaint reinstated, and the matter is remanded to the district court for further proceedings on the merits.

Appendix A

FOOTNOTE

1. 18 U.S.C. § 1962 provides in relevant part

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Appendix A

WINTER, *Circuit Judge, dissenting:*

Acknowledging the difficulty of the question at issue, I respectfully dissent.

Our recent decisions in *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989) (en banc) and *Beauford v. Helmsley*, 865 F.2d 1386 (2d Cir. 1989) (en banc), teach that the existence of the relatedness and continuity requisite to a finding of a pattern of racketeering activity is to be determined by viewing the facts or allegations as a whole and without the application of mechanical tests such as requirements of multiple or openended schemes or separation of temporal acts. *Id.* at 1391. My disagreement with my colleagues stems from their holding that any allegation of multiple related acts separated in time is, without more, enough to establish continuity.

The fact that multiple acts separated in time may not by themselves be sufficient was one reason that *Indelicato* and *Beauford* distinguished between enterprises that are inherently criminal and those that are not. In the case of the former, multiple acts in furtherance of the enterprise necessarily carry with them the threat of continuing illegal activity even if simultaneous. In the case of the latter, multiple acts even if separated in time do not necessarily carry with them that threat. *Id.* We thus held in *Beauford* that a complaint stated a valid civil RICO claim where there had been thousands of fraudulent mailings to an indeterminate number of largely unrelated victims — all persons who might be interested in purchasing one of several thousand apartments — and there was an expectation based on the anticipated rate of sales and the need to update offering papers that "similarly fraudulent mailings would be made over an additional period of years" 865 F.2d at 1392.

The present case is very different, however. First, in *Beauford* there were vastly greater numbers of fraudulent acts and there was an explicit intention to continue the mailings. Second, the sole victims of the fraud in the present case are two corporations working essentially as principals in a joint venture to complete a single construction project. In contrast, the victims in *Beauford* were a segment of the general public. It simply belies belief that the racketeering acts alleged here — misrepresentations to Procter & Gamble and Riverview as to expertise, cost estimates, actual costs and various diversions of funds with regard to one project — were not inherently selflimiting. The defendants surely had testable expectations as to progress in the construction that would be directly affected by the fraudulent acts. The length and breadth of the plaintiffs' allegations being those acts, these defendants and that project, I have no hesitation in labeling the conduct here "isolated."

To be sure, it was the case in *Beauford* that the fraud would ultimately cease, but only because of the wisdom in Lincoln's dictum that you can fool some of the people some of the time but not all of the people all of the time. Where the enterprise is not inherently criminal, fraudulent acts directed to large numbers of unrelated people entail a far different risk of a continuation of illegal acts than do acts directed at a small number of related commercial entities capable of quickly learning the true facts. This distinction is of considerable importance in the RICO context. If adopted, it would limit civil RICO to those cases most likely to involve sustained harm to the public and would avoid transforming every private dispute over a periodic performance contract into a RICO claim. It may be that the line I am seeking to draw is neither bright nor straight, but it is a line that is discernible and of usefulness in limiting civil RICO to situations in which the threat of continuing activity truly exists. Moreover,

Appendix A

I fear that my colleagues have adopted a test that may turn out to be no line at all. If, for example, a lumber yard selling to the Riverview project were to deliver five loads of lumber in each of which one two-by-four was missing and then mail five bills for the full amount, a civil RICO claim could be alleged under their theory.

I therefore respectfully dissent.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of July one thousand nine hundred and eighty-nine.

Present:

HON. RICHARD J. CARDAMONE
HON. RALPH K. WINTER
HON. ROGER J. MINER
Circuit Judges,

Docket No. 87-7324

THE PROCTER & GAMBLE COMPANY and RIVERVIEW PRODUCTION INC.,

Plaintiffs-Appellants,

v.

BIG APPLE INDUSTRIAL BUILDINGS, INC., AROL I. BUNTZMAN, MARTIN WILLIAM HALBFINGER, ESQ., GEORGE A. FULLER COMPANY, THE ARKHON CORPORATION, HAINES LUNDBERG WAEHLER, and JOHN DOES 1-10,

Defendants-Appellees.

Appendix B

A petition for a rehearing having been filed herein by Appellees BIG APPLE INDUSTRIAL BUILDINGS INC., AROL I. BUNTZMAN and MARTIN WILLIAM HALBFINGER, ESQ.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Judge Winter dissenting.

Elaine B. Goldsmith,
Clerk

s/ Kathleen Brown
Deputy Clerk

Filed: July 31, 1989

Nos. 89-692, 89-805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BIG APPLE INDUSTRIAL BUILDINGS, INC., AROL I. BUNTZMAN and MARTIN WILLIAM HALBFINGER, ESQ.,

Petitioners,

—v.—

THE PROCTER & GAMBLE COMPANY and RIVERVIEW PRODUCTIONS, INC.,

Respondents.

AMERICAN INTERNATIONAL CONTRACTORS, INC.,

Petitioner,

—v.—

THE PROCTER & GAMBLE COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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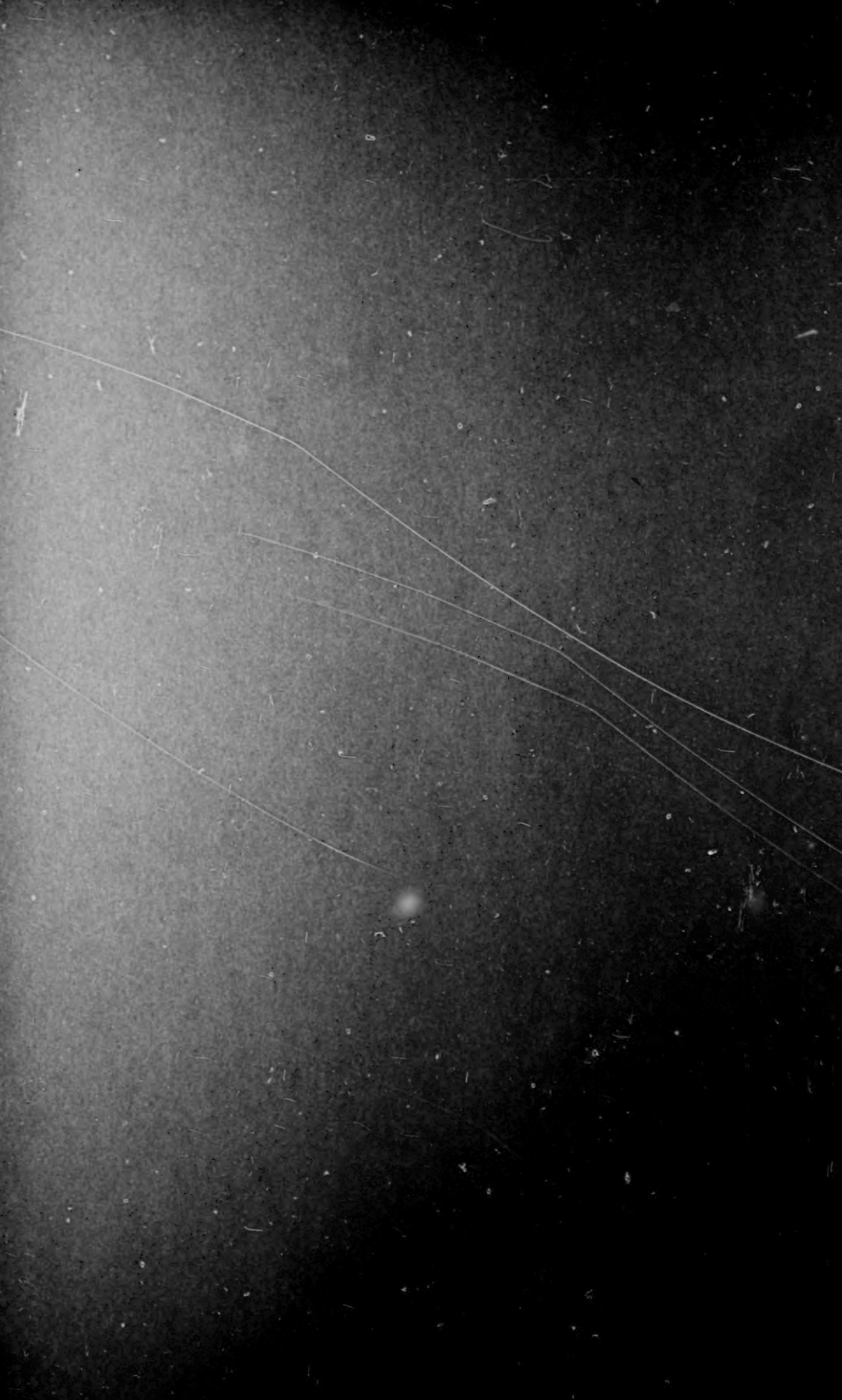

COUNTERSTATEMENT OF QUESTION PRESENTED

Should this Court invoke its certiorari jurisdiction to reconsider the precise issue it decided just several months ago in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), where

(a) no reason is advanced for such an unusual exercise of the Court's discretion apart from petitioners' general disagreement with the result in *H.J. Inc.*;

(b) RICO is clearly constitutional as applied to petitioners' alleged frauds, and petitioners do not and cannot claim lack of fair notice that their conduct, as alleged in the complaint, violated well established proscriptions of the criminal law; and

(c) petitioners' constitutional vagueness claim (which was not raised in the District Court or the Court of Appeals) was recently rejected by this Court in *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989), with respect to a virtually identical state RICO statute?

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RULE 28.1 STATEMENT

D'Arcy Masius Benton & Bowles, Inc. is the parent company of respondent Riverview Productions, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 89-692, 89-805

BIG APPLE INDUSTRIAL BUILDINGS, INC., AROL I. BUNTZMAN and MARTIN WILLIAM HALBFINGER, ESQ.,

Petitioners,

—v.—

THE PROCTER & GAMBLE COMPANY and RIVERVIEW PRODUCTIONS, INC.,

Respondents.

AMERICAN INTERNATIONAL CONTRACTORS, INC.,

Petitioner,

—v.—

THE PROCTER & GAMBLE COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The petitions do not present any issue meriting review by this Court.

The Court of Appeals, in reinstating respondents' complaint, employed a definition of RICO's "pattern of racketeering activity" element wholly consistent with this Court's recent decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989). The "pattern" allegations here plainly sat-

isfy the pleading requirements of "continuity plus relationship" as set forth by this Court in that case. *Id.* at 2900. Accordingly, the Second Circuit's decision—adhered to by that Court upon application for rehearing filed by petitioners *after* the decision in *H.J. Inc.*—does not warrant further review.

Nor is the supposed constitutional vagueness of RICO a basis for granting the petitions. The claim was not raised below and no sufficient reason appears why it should be resolved in the first instance by this Court. In any event, the RICO "pattern of racketeering" requirement is constitutional as applied to petitioners' conduct. The claim of lack of fair notice is also belied by petitioners' knowledge that the alleged conduct violated *some* law, even if it were true that they could not have realized it would be held to violate RICO; there is no argument that the multiple underlying predicate acts of mail and wire fraud are unconstitutionally vague. Finally, this Court's recent decision in *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989)—rejecting a constitutional vagueness challenge to virtually identical provisions of the Indiana state RICO statute—completely disposes of petitioners' constitutional claim.

For the most part, the petitions constitute an undisguised request that this Court overrule its several months old decision in *H.J. Inc.*—with no reason offered for such an extraordinary step except the arguments contained in Justice Scalia's concurrence but rejected by a majority of the Court.[1] This Court has repeatedly said that if RICO is being "abused" by application

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1 The only supposed distinction said to justify reconsideration of the pattern of racketeering definition is the specious argument that *H.J. Inc.* was somehow different because it involved "inherently criminal conduct" whereas the criminal fraud allegations in this case relate to "an ordinary construction dispute arising out of a typical commercial transaction." (Petition of American International Contractors, Inc. ("Fuller Pet.") 6.) Otherwise, petitioner is frank to say it seeks review on the ground that *H.J. Inc.* was badly reasoned. (*E.g.*, Fuller Pet. 5, 7-9.)

American International Contractors, Inc. was previously known as the George A. Fuller Company and filed its petition under that name. In conformity with the petition, American International Contractors, Inc. is referred to in this brief in opposition as "Fuller."

to disputes not anticipated to be within its scope, then Congress may rewrite the statute. *E.g.*, *H.J. Inc.*, 109 S. Ct. at 2905. Dissatisfaction with the statute does not, however, warrant review by this Court of the manifestly correct decision of the Court of Appeals in this case.

STATEMENT OF THE CASE

1. The Facts

The facts giving rise to this case are briefly recounted in the opinion of the Court of Appeals. (App. A at pp. A-2 to A-5 and A-12 to A-14.)[2] The petitions, however, do not fully or fairly recite the material allegations of respondents' complaint that are pertinent to consideration of the Question Presented. Accordingly, we summarize them here.[3]

This case arises out of the now dormant Riverview studios project, a proposed complex of television studios and produc-

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2 Citations to "App. A" are to the opinion of the Court of Appeals reprinted as Appendix A to the Fuller petition. The opinion is reported at 879 F.2d 10 (2d Cir. 1989).

3 Because petitioners seek review of a judgment dismissing the RICO cause of action for failure to state a claim, Fed. R. Civ. P. 12(b)(6), the alleged facts must be read in the light most favorable to respondents. *E.g.*, *H.J. Inc.*, 109 S. Ct. at 2906; *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Petitioners disregard this requirement. Their claim of "certworthiness" is wholly premised on dissenting Judge Winter's conclusory characterization of petitioners' alleged frauds as mere "acts directed at a small number of related commercial entities capable of quickly learning the true facts." (Petition of Big Apple Industrial Buildings, Inc., Arol I. Buntzman and Martin William Halbfinger, Esq. ("Big Apple Pet.") 6.) As noted in the Court of Appeals majority opinion, that assessment of the complaint

> apparently ignores the fact that the instant litigation is only at the pleading stage. Whether [petitioners'] actions are continuing in nature or isolated or sporadic will be the subject of proof at trial. The accepted-as-true allegations in the complaint refute the view that [petitioners'] fraudulent actions towards [respondents] were unrelated or disconnected. Hence, the spectre of continuity of criminal offenses in the pattern of activity is sufficiently pleaded to withstand dismissal at this stage of the litigation.

(App. A at A-14.)

tion facilities in New York City. The complex was intended to be used for the production of three soap opera serials owned by a subsidiary of respondent The Procter & Gamble Company ("Procter & Gamble"). Respondent Riverview Productions, Inc. ("Riverview"), the lessee of the studios, was a subsidiary of the advertising agency D'Arcy Masius Benton & Bowles, Inc., and was involved in production of the shows. Petitioner Big Apple Industrial Buildings, Inc. ("Big Apple") was the owner and developer of the project site. Petitioner Arol Buntzman was Big Apple's President, and petitioner Martin William Halbfinger was their lawyer. Petitioner Fuller served as general contractor in connection with construction of the project. (App. E at A-29 to A-32.)[4]

For a period of more than two years, continuing until discovery of the frauds by respondents and the filing of the complaint in this action, petitioners are alleged to have engaged in a pattern of racketeering activity consisting of at least five separate but related fraudulent schemes.[5] The complaint alleges that petitioners first defrauded Riverview into signing and Procter & Gamble into guaranteeing a lease for three as yet unbuilt television studios, which called for the payment of rent based on the actual costs of constructing the project. In furtherance of this initial fraudulent scheme, numerous representations were made to respondents with respect to the alleged expertise of petitioners Buntzman and Big Apple and the projected costs of the studios. For example, Buntzman claimed that he had "developed the Bronx Terminal Market into the largest cash-and-carry wholesale shopping center in the world;" that he had been instrumental in the development of other major projects; and that he had been involved in other studio ventures. All of these representations were false. As respondents were later to dis-

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4 Citations to "App. E" are to respondents' complaint in this action, reprinted as Appendix E to the Fuller petition.

5 Specifically, petitioners are alleged to have conducted and participated in the conduct of, and to have acquired and maintained an interest in, the affairs of an association in fact enterprise consisting of Buntzman and Halbfinger, and to have conspired to do so, through a pattern of racketeering activity, all in violation of 18 U.S.C. § 1962(b), (c) and (d). (App. E at A-67 to A-69.)

cover, Buntzman had no experience in major development or studio operation and the Bronx Terminal Market had involved only minor construction by Buntzman and was riddled with financial, legal and other problems. (App. E at A-34 to A-37.)

Buntzman also represented, both orally and in writing, that the total cost of the three television studios to be occupied by Riverview would not exceed $25 million. In part by using an estimate prepared and mailed by Fuller, Buntzman stated that the "hard" construction costs would not be in excess of $18 million and would more likely be in the range of $14 million. These representations were also false. Petitioners knew full well that these cost estimates were wholly unrealistic and they suppressed more accurate data when it was obtained. (App. E at A-37 to A-40.)

In January 1985, based on these misrepresentations, Riverview entered into a lease with Big Apple for the three as yet to be constructed studios for a term of ten years, with a ten year option term ("the Lease"), and Procter & Gamble issued its guarantee of Riverview's rental and other obligations under the Lease ("the Lease Guarantee"). As all parties well knew, the issue of projected construction cost was critical because, even though Big Apple was to build the studios for Riverview, annual rent under the Lease was to be the sum of $1.2 million, plus Big Apple's annual debt service, including amortization over a ten year period, of a permanent loan for the entire actual construction cost of the project. (App. E at A-39 to A-40.)

As the transaction was originally structured by the parties, Procter & Gamble and Riverview were to have no role in the financing of construction. Big Apple was to secure the necessary construction loan based on Procter & Gamble's Lease Guarantee. But once preliminary architectural and construction work began, with Fuller acting as general contractor, Big Apple discovered that it was unable to arrange favorable financing solely on the strength of the Lease Guarantee. Faced with the possibility that it would not be able to construct the studios and that the project would thereby be aborted, Big Apple embarked on a second fraudulent scheme, to induce Procter & Gamble to

agree to obtain and guarantee a construction loan. (App. E at A-40 to A-45.)

The most prominent feature of this scheme related to an estimate of hard construction costs, which was prepared by Fuller and was to have been shared with all parties and used as a basis for arriving at an estimated construction cost for purposes of certain provisions in the Lease. When Fuller's analysis showed that Fuller believed the true hard costs would be more than twice what had previously been represented, petitioners suppressed it. They then hired other estimators, to whom they gave inaccurate and incomplete information so as to ensure that the estimate would be closer to the earlier figures, allaying respondents' concerns. (App. E at A-41 to A-43.)[6]

The result of this second scheme was an agreement by Procter & Gamble to become involved with the financing of the project—a need that petitioners had not anticipated when they commenced their earlier fraudulent scheme to induce agreement on the Lease, and, correspondingly, an obligation that respondent Procter & Gamble had not previously assumed. In a document known as the Tri-Party Agreement, executed six months after the Lease, Procter & Gamble agreed to guarantee up to $25 million of construction financing to be provided by Citibank. If, despite Big Apple's satisfaction of certain "Requisition Requirements," Citibank or any other construction lender failed to fund a requisition for "Actual Construction Costs," Procter & Gamble agreed to do so itself, subject to the same $25 million limit. (App. E at A-44.)

By early 1986, the $25 million limit was reached. On a requisition by requisition basis, Procter & Gamble extended its guarantee and Citibank increased the amount of the construction loan. During this period of time, as costs continued to escalate, petitioners continued to mislead Procter & Gamble and River-

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6 Fuller seeks to minimize its role in the alleged misconduct. (Fuller Pet. 3, 15.) In fact, as more fully developed below, Fuller's participation in this fraud relating to suppression of its cost estimate, beginning in early 1985, was only the first of numerous acts of mail and wire fraud more than sufficient to demonstrate a threat of continuing criminal behavior. *See* pp. 11-14 *infra*.

view as to the anticipated cost and continued to hide the Fuller estimate. (App. E at A-44 to A-45.)

A total of $32 million in hard and soft costs was advanced by Citibank and guaranteed by Procter & Gamble. These funds were disbursed to Big Apple from June 1985 to April 1986, upon presentation by Big Apple of eleven separate requisitions to Citibank. Each requisition was accompanied by certifications made by petitioners that the sums requisitioned represented "Actual Construction Costs," as defined in the Lease. In fact, as Procter & Gamble and Riverview later learned, the requisitions and related documents were part of still further frauds, the object of which was to misappropriate and divert construction loan funds, which would ultimately burden Procter & Gamble and Riverview through ten years of rental payments. (App. E at A-45 to A-51.)

As alleged in the complaint, among the millions of dollars improperly requisitioned by petitioner Big Apple over this period of nearly a year were legal fees and disbursements of $657,000 to petitioner Halbfinger, purportedly representing "Actual Construction Costs;" $625,000 in fees to Big Apple's "construction manager," even though it failed to perform the functions for which it was hired; duplicative insurance costs of at least $3 million; excessive mark-ups by petitioner Fuller; Christmas bonuses for Fuller payroll employees; unnecessary brokerage fees for so-called "risk management" services; winterization charges already included in subcontractors' bids; and charges attributable to portions of the project other than those covered by the Riverview Lease. (App. E at A-46 to A-51.)

Apart from lining their own pockets, petitioners fraudulently employed the requisition procedure as a means to protect themselves against the possibility that their misbehavior would be discovered and respondents would refuse to fund the project any further. Thus, funds were requisitioned into escrow accounts, purportedly to cover "long lead items," but in actuality intended to allow construction to proceed if petitioners' frauds were detected. For the most part, these accounts appear not to have been true escrow accounts but were controlled

entirely by Big Apple, with Halbfinger as the escrow agent. Petitioners also embarked on a scheme to falsely blame construction delays on respondents and thereby to create a record for charging Riverview "interim rent"—potentially amounting to millions of dollars of further padding for their financial cushion. (App. E at A-51 to A-58.)

By April 1986, respondents had begun to discover, through various meetings and by auditing of documents reluctantly provided by petitioners, the extent to which they had been defrauded and the construction loan funds had been improperly requisitioned and applied. The result of these frauds was that, although $32 million had already been poured into the project—that is, more than had been represented as sufficient to *finish* it—the project was approximately one-third complete, with a potential total cost in excess of $100 million and no completion date in sight. (App. E at A-59 to A-62.)

2. The District Court Decision

The District Court dismissed respondents' RICO cause of action (and, because this claim was the sole basis of federal jurisdiction, the entire complaint) in a decision dated March 13, 1987.[7] The court concluded that the alleged pattern of racketeering did not possess sufficient "continuity" to fit within the statute. (App. B at A-21.)

The District Court did not address respondents' contention that petitioners had engaged in a number of continuing separate criminal schemes over a period of years, sufficient to satisfy even the "multiple scheme" requirement which had been imposed by some courts at that time. The district judge instead simply recast the complaint, contrary to a fair reading of its allegations, as charging a single scheme, implemented by

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7 The decision of the District Court is reprinted as Appendix B to the Fuller petition, at pages A-17 to A-24. The opinion is reported at 655 F. Supp. 1179 (S.D.N.Y. 1987).

"repeated fraudulent assertions." On this basis, the District Court dismissed the complaint. (App. B at A-20 to A-22.)[8]

3. The Court of Appeals Decision

Following its *en banc* decisions in *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989) (*en banc*) and *Beauford v. Helmsley*, 865 F.2d 1386 (2d Cir. 1989) (*en banc*)—decided after the District Court's ruling in this case—and correctly anticipating this Court's decision in *H.J. Inc.*, the Court of Appeals rejected any attempt to impose a multiple scheme requirement. (App. A at A-9 to A-10.) Instead, recognizing that the facts demonstrating continuity (or the threat of continuity) "will vary in each case," the Second Circuit concluded simply that a plaintiff must "plead a basis from which it could be inferred that the acts . . . were neither isolated nor sporadic." (App. A at A-10 (citation omitted).)[9]

Applying this standard to respondents' complaint, the Court of Appeals had little difficulty finding a sufficient pattern of racketeering allegation. The Court noted that petitioners are charged with at least five separate fraudulent schemes "on a number of fronts," involving written and oral misrepresenta-

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8 The District Court also ruled against respondents in part on the ground that the frauds alleged in the complaint, though continuing, were "finite." (App. B at A-22 to A-23.) That supposed component of the continuity requirement—that the alleged scheme or schemes must have no demonstrable ending point—was rejected both by the *en banc* Second Circuit in *Beauford v. Helmsley*, 865 F.2d 1386, 1391 (2d Cir. 1989) (*en banc*), and by this Court in *H.J. Inc.*, *see* 109 S. Ct. at 2902. These holdings thus completely refute petitioners' claim that *certiorari* review is required in light of the district court's "determination of a lack of continuity," and in light of Judge Winter's conclusion that the alleged fraudulent behavior is "inherently self-limiting." (Big Apple Pet. 6; Fuller Pet. 16.) Both judges were employing an improper definition of pattern.

9 Petitioners Big Apple, Buntzman and Halbfinger challenge only the continuity prong of the continuity plus relationship test. (Big Apple Pet. 6, 8-9.) Petitioner Fuller purports to find fault with the entire *H.J. Inc.* definition of pattern of racketeering, but its only specific challenge in the context of this case is similarly to the continuity requirement. (Fuller Pet. 15-16.)

tions as to petitioners' development experience and expertise and as to construction costs, along with false and excessive invoices and certifications, all occurring over a two year period. Accepting these allegations as true upon motion to dismiss under Fed. R. Civ. P. 12(b)(6)—and noting that the evidence at trial might or might not suffice to persuade a jury that petitioners "actions are continuing in nature [rather than] isolated or sporadic"—the Court of Appeals held that "the spectre of continuity of criminal offenses in the pattern of activity is sufficiently pleaded to withstand dismissal at this stage of the litigation." (App. A at A-13 to A-14.)

REASONS FOR DENYING THE WRIT

1. The Court of Appeals decision formulates and applies a definition of "pattern of racketeering" consistent with this Court's decision in *H.J. Inc.*

The Court of Appeals adopted a flexible definition of the continuity component of a RICO pattern of racketeering:

> For the purposes of RICO, "continuity" means that separate events occur over time and perhaps threaten to recur . . . .

(App. A at A-11.) Rather than rigidly limiting the manner in which continuity may be proved (by, for example, imposing a "multiple scheme" requirement not warranted by the language or legislative history of RICO), the Court of Appeals provided several differing examples of proof of continuity. The nature of the enterprise itself (for example, an organized crime group whose very business is racketeering activity) may automatically carry with it the threat of continued racketeering activity. Alternatively, the existence of multiple schemes or a great number of predicate acts, carried out over a lengthy period of time, may provide sufficient indicia of continuity or threat of continuity. (App. A at A-10.) What matters is that there be some "basis from which it could be inferred that the acts . . . were neither isolated nor sporadic." (App. A at A-10 (citation omitted).)

This was precisely the approach followed in *H.J. Inc.* After rejecting the multiple scheme test in language mirroring that of the Second Circuit, this Court defined the continuity requirement as follows:

> We adopt a less inflexible approach that seems to us to derive from a common-sense, everyday understanding of RICO's language and Congress' gloss on it. What a plaintiff or a prosecutor must prove is continuity of racketeering activity, or its threat, *simpliciter*.

109 S. Ct. at 2901. The Court then offered examples. Continuity may be established, as the Second Circuit had previously concluded, by the sheer number of racketeering acts, "extending over a substantial period of time." *Id.* at 2902. Alternatively, a sufficient *threat* of continuity may be proved by showing that predicate acts are part of an ongoing criminal entity's way of doing business, or are a regular way of conducting an otherwise legitimate business or other RICO enterprise. Ultimately, whatever may be the manner and items of proof in a particular case, the plaintiff must establish that the predicate acts are not "sporadic activity," but instead "themselves amount to, or . . . otherwise constitute a threat of, *continuing* racketeering activity." *Id.* at 2900-01.

In sum, the first question posed by the petitions—what constitutes a RICO pattern of racketeering—was answered by this Court just five months ago, and was answered identically by the Court of Appeals in this case. The asserted need for further review is thus nonexistent.

2. The "pattern of racketeering" allegations more than amply satisfy the "continuity" component of the test set forth in *H.J. Inc.*

The complaint in this case meets the threshold pleading requirement set forth by this Court in *H.J. Inc.* As alleged with great particularity in the complaint, petitioners engaged in a series of related schemes in connection with the leasing, financing, construction and operation of the Riverview studio complex, continuing over a period of more than two years—although

contemplated by petitioners to last longer—and halted only by respondents' discovery of the frauds. Specifically, the complaint alleges:

> • A scheme fraudulently to induce execution of the Lease, Lease Guarantee and related documents, carried out by misrepresentations as to Buntzman's and Big Apple's experience and expertise in custom construction and renovation work and by misrepresentations as to construction costs. This scheme began as early as April 1984 and culminated in execution of the Lease by Riverview and the Lease Guarantee by Procter & Gamble in January 1985. The consequences of this fraud would have continued throughout the ten year term of the Lease and beyond if the option term had been exercised. (App. A at A-34 to A-40.)
>
> • A scheme—hatched upon petitioners' discovery that they would encounter difficulty in getting favorable financing without Procter & Gamble's backing—fraudulently to induce respondents to continue with the project and Procter and Gamble to guarantee financing, involving further misrepresentations and omissions as to construction costs, as well as concealment of cost estimates which would have revealed the true construction cost. (App. A at A-40 to A-45.)
>
> • A scheme fraudulently to divert construction funds and charge grossly excessive professional and other fees, effected by misrepresentations as to the need for and extent of construction costs and professional and other fees. (App. A at A-45 to A-51.)
>
> • A fraudulent scheme with the purpose and effect of building a financial "cushion" against the day respondents discovered the frauds and refused to guarantee or advance further funds, implemented by misrepresentations as to the extent of funds required to be held in escrow as assurance of payment to subcontractors. (App. A at A-51 to A-55.)

- A scheme with the twin purposes of enabling petitioners (a) to evade responsibility for construction delays properly attributable to them, and (b) fraudulently to collect "interim rent" under the Lease.

These frauds plainly amount to "a series of related predicates extending over a substantial period of time." *H.J. Inc.*, 109 S. Ct. at 2902. Moreover, the complaint contains numerous factual allegations demonstrating a threat of continuing criminal behavior extending beyond the "closed period" of time framed by the complaint, which was terminated only by respondents' discovery of petitioners' frauds. *See id.*

At every turn, petitioners reacted to unexpected developments, or to the possible unravelling of their schemes, by perpetrating new ones. Thus, having succeeded by their numerous misrepresentations in inducing respondents to do business with them (with the signing of the Lease and Lease Guarantee in January 1985), and thereafter having been confronted with their likely inability to raise funds on their own, petitioners engaged in a second fraudulent scheme to obtain Procter & Gamble's participation in securing financing for the project. This scheme involved the active complicity of Fuller, which participated in concealing the results of its cost estimate so as not to betray the falsity of petitioners' repeated earlier cost projections.[10]

This willingness to meet unanticipated difficulties in carrying out the first fraud by launching a second one, in the process saddling respondent Procter & Gamble with substantial new obligations, surely demonstrates the sort of ongoing, nonaberrational behavior that RICO was designed to cover. So do

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10 Fuller's active participation in this early fraud—and its subsequent participation in other frauds, including its submission of false requisitions for construction funds and false certifications relating to the escrow accounts—completely belies its claim that the Court of Appeals improperly sustained the complaint as to Fuller solely on the basis of " 'false and excessive invoices over a period of nearly two years', by defendants *other than* [*Fuller*]." (Fuller Pet. 15 (emphasis in original).) As pleaded in the complaint, Fuller's participation in the alleged RICO, beginning in early 1985, was pervasive.

petitioners' repeated efforts to save their scheme from discovery by failing to provide requested back-up and other information, playing on respondents' then critical need to occupy the studios with the plea not to let paperwork slow down the project while promising to provide, but never producing, the documents. So do petitioners' additional misrepresentations as to the costs to complete the project, in order to induce funding of construction beyond the original $25 million limit. So does the repeated misuse of the requisition process—beginning with the very first requisition in January 1985 and continuing each and every month for over a year—with all requisitions apparently containing improper and excessive charges, including charges for work on aspects of the construction not properly allocable to the Riverview studios. In the words of this Court's recent formulation, "the[se] predicate acts or offenses are part of an ongoing entity's regular way of doing business." *H.J. Inc.*, 109 S. Ct. at 2902.

Other alleged misbehavior establishes the requisite threat of continuity in similar fashion. So, for example, requisitioning substantial sums for supposed "soft" costs such as petitioner Halbfinger's grossly excessive legal fees, and falsely charging respondents with construction delays so as to be able to collect interim rent, were separate frauds related to the construction project but not directly necessary to its accomplishment. When petitioners were presented with these additional opportunities to personally enrich themselves and to bilk Procter & Gamble and Riverview, they took them. These predicate acts are thus further evidence that petitioners "regular way of doing business" is through a pattern of criminal frauds.

Only by joining with Judge Winter in conclusorily deeming these frauds "easily discoverable"—a determination which respondents vigorously contest, and in any event one properly for the ultimate factfinder at the close of a trial—can petitioners make the claim that the complaint does not adequately plead a RICO pattern of racketeering. That approach was rejected in *H.J. Inc.* and should be rejected here.

3. RICO's "pattern of racketeering" requirement is not unconstitutionally vague.

In an effort to manufacture a "special and important reason" for grant of the writ,[11] petitioners claim that RICO's "pattern of racketeering activity" element is so vague as to violate the notice requirement that the Due Process Clause imposes on criminal statutes. (Big Apple Pet. 6-9; Fuller Pet. 11-16.) This contention, never presented to the Court of Appeals, is unworthy of review.[12]

In the first place, petitioners' challenge must fail because the statute is clearly constitutional as applied to them. *See United States v. National Dairy Corp.*, 372 U.S. 29, 33 (1963) ("In determining the sufficiency of the notice a statute must of necessity be examined in light of the conduct with which a defendant is charged."). When a criminal charge is based on actions constitutionally subject to prohibition and themselves clearly forbidden by a statute, it is no defense that the statute would be unconstitutionally vague if applied to other conduct. *United States v. Raines*, 362 U.S. 17, 21 (1960); *Williams v. United States*, 341 U.S. 97, 101-02 (1951). While there may be some difficulty in determining whether certain marginal conduct comes within RICO, there can be no question that the ongoing series of fraudulent schemes alleged here constitutes a "pattern" of misbehavior by any reasonable understanding of that term.

A defendant is constitutionally entitled to no more. This Court has repeatedly recognized that statutory proscriptions

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11 U.S. Sup. Ct. R. 17.1.

12 This failure to raise the issue below is alone sufficient basis for denying review. *See, e.g., Duignan v. United States*, 274 U.S. 195 (1927) (noting that "only in exceptional cases" will this Court pass upon questions not considered below, and refusing to hear a constitutional due process challenge to a forfeiture statute not raised in the Court of Appeals, even though the issue *was* ruled on by the trial court). Moreover, contrary to Fuller's contention, petitioners' as applied constitutional challenge to RICO is not a pure question of law. *See, e.g., Coates v. City of Cincinnati*, 402 U.S. 611, 618 (1971) (White, J., dissenting) ("ruling on . . . a [vagueness] challenge obviously requires knowledge of the conduct with which a defendant is charged").

cannot be expressed with mathematical precision, and that no statute can be "defined" to include a description of every future case that might fit within it. *E.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *American Communications Association v. Douds*, 339 U.S. 382, 412 (1950). Instead, all that is required is a law "directed with reasonable specificity toward the conduct to be prohibited." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). In *Coates*, this Court struck down an anti-loitering ordinance prohibiting "annoying" behavior because

> [c]onduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard is specified at all.

Id.

The RICO pattern of racketeering element does contain such standards. To begin with, a pattern is defined to require at least two predicate acts of racketeering, here alleged to be a series of numerous mail and wire frauds. The statute thus plainly communicates that under some circumstances as few as two predicate acts of mail or wire fraud will suffice to make out a pattern. There is nothing vague or unclear about those statutes and no claim is made that petitioners' misbehavior does not properly come within them. Further, unlike the wholly subjective concept of "annoyance," the term "pattern" has an objective core definition accepted in one formulation or another by every court to have considered this issue. That is, a pattern is an arrangement or ordering of things, going beyond mere multiplicity and having some organizing principle. *See H.J. Inc.*, 109 S. Ct. at 2900-01. The legislative history of RICO has always been clear in elucidating just what that organizing principle is: RICO does not apply to predicate acts of racketeering that are isolated or sporadic, but only to multiple predicate acts characterized by relatedness and continuity, both of which are themselves terms with "imprecise but comprehensible normative"

meaning, all that is constitutionally required. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

As described in detail above, petitioners' multiple fraudulent schemes plainly meet the test of relatedness and continuity, and thus comprise a pattern under a constitutionally sufficient definition known to petitioners since passage of the statute.[13]

Moreover, petitioners' fair notice claim rings hollow in the absence of any constitutional or other challenge to the underlying mail and wire fraud allegations. Vague laws transgress the fair notice component of the Due Process Clause because they deprive a law abiding citizen of choosing how to conduct his affairs. "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Consistent with that purpose and rationale, fair notice challenges have been rejected where the presence of some other statute or parallel enforcement scheme unequivocally marked the defendant's conduct as wrongful, so that there was no doubt he had made a conscious decision to violate *some* law. *E.g.*, *United States v. Seregos*, 655 F.2d 33, 36 (2d Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); *cf. United States v. Ragen*, 314 U.S. 513, 524 (1942) (defendant

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13 Petitioners attack the RICO pattern of racketeering component as if a defendant were required to look no further than the language of the statute. (*E.g.*, Fuller Pet. 13.) But the data available to a putative defendant in assessing whether his contemplated conduct will be deemed illegal is not so limited. As repeatedly defined by this Court, the issue is whether, viewing the statute and all other relevant legal materials objectively, a prospective criminal defendant has been given fair notice that his conduct violated the law. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 111 (1972) (upholding otherwise vague ordinance on strength of prior state judicial opinion limiting application of different but similarly worded ordinance); *Lanzetta v. New Jersey*, 306 U.S. 451, 453-57 (1939) (declining to uphold anti-gang statute because judicial opinion narrowing otherwise vague statutory term post-dated the convictions in that case). The legislative history of RICO, including explication of the pattern requirement, was the subject of discussion in numerous judicial opinions available to petitioners.

claimed income tax evasion statute did not provide fair notice because it required the jury to determine whether certain salaries paid to employees were "reasonable" compensation properly deductible or were, instead, nondeductible dividend payments falsely denominated as compensation to those employees; this Court rejected that vagueness claim, noting that "[a] mind intent on willful evasion is inconsistent with surprised innocence").

Finally, petitioners' attack on the RICO statute ignores this Court's recent decision in *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989), upholding the Indiana state RICO statute in response to an identical void for vagueness challenge.[14] Because the Indiana statute tracks in pertinent part the language of the federal RICO statute, prohibiting a "pattern" of multiple violations of certain enumerated substantive crimes, the decision in that case is squarely on point.[15]

In *Fort Wayne Books*, the defendant was charged with RICO offenses under the Indiana statute where the underlying acts were violations of the state's obscenity statutes. On appeal he challenged the use of state obscenity statutes as a basis for a RICO prosecution, and also challenged the state RICO statute itself on vagueness grounds. In rejecting these challenges, this Court stated unequivocally:

> Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague,

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14 Chief Justice Rehnquist and Justices White, Blackmun, Scalia and Kennedy joined in the portion of the Court's opinion in *Fort Wayne Books* upholding the Indiana RICO.

15 The only difference is the presence in the Indiana statute of language requiring that the underlying racketeering acts "have the same or similar intent, result, accomplice, victim, or method of commission, or that [they be] otherwise interrelated by distinguishing characteristics that are not isolated incidents." Ind. Code § 35-45-6-1(2). That additional language is almost identical to the language defining "pattern" in the Dangerous Special Offender Sentencing Act, 18 U.S.C. § 3575(e), which this Court has said is to be used in assessing the relatedness of the predicate acts under federal RICO. Thus, the statutes are effectively identical.

> the former cannot be vague either. At petitioner's forthcoming trial, the prosecution will have to prove beyond a reasonable doubt each element of the alleged RICO offense, including the allegation that petitioner violated (or attempted or conspired to violate) the Indiana obscenity law. . . . Thus, petitioner cannot be convicted of violating the RICO law without first being "found guilty" of two counts of distributing (or attempting to, or conspiring to, distribute) obscene materials.

Id. at 925.

In fact, this Court concluded that the RICO law—by virtue of the pattern requirement—was necessarily *less* vague than any of the underlying offenses might be standing alone:

> [B]ecause the scope of the Indiana RICO law is more limited than the scope of the State's obscenity statute—with obscenity-related RICO prosecutions possible only where one is guilty of a "pattern" of obscenity violations—it would seem that the RICO statute is inherently *less* vague than any state obscenity law: a prosecution under the RICO law will be possible only where all the elements of an obscenity offense are present, and then some.

Id. at 925 n.7.

Accordingly, here, as in *Fort Wayne Books*, because the underlying substantive violation is not unconstitutionally vague, a RICO prosecution based on a pattern of such conduct cannot be challenged on void for vagueness grounds.

The holding of *Fort Wayne Books* is in keeping with a series of decisions in the lower federal courts, over a period of more than fifteen years beginning shortly after passage of RICO, finding the statute not unconstitutionally vague. *United States v. Aleman*, 609 F.2d 298, 305 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980) (term "enterprise" broad but not vague); *United States v. Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir.), *cert. denied*, 441 U.S. 933 (1979) (§ 1962(c), including term "pattern of racketeering," is not vague); *United States v. Herman*, 589 F.2d 1191, 1198 (3d Cir. 1978), *cert. denied*, 441 U.S.

913 (1979) (same); *United States v. Hawes*, 529 F.2d 472, 478-79 (5th Cir. 1976) ("enterprise" broad but not vague); *United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976) (§ 1962 as a whole not vague and terms "enterprise" and "person" not vague in particular); *United States v. Parness*, 503 F.2d 430, 440-42 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (rejecting contention that "pattern of racketeering activity" is void for vagueness).

For all these reasons, the constitutional vagueness claim, like petitioners' other arguments, provides no basis for review.

CONCLUSION

The petitions should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1989

BIG APPLE INDUSTRIAL BUILDINGS, INC., AROL I. BUNTZMAN and MARTIN WILLIAM HALBFINGER, ESQ.,

Petitioners,

vs.

THE PROCTER & GAMBLE COMPANY and RIVERVIEW PRODUCTIONS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents' brief in opposition ("P&G Br.") raises several new arguments, necessitating the instant reply.

1. Petitioners did assert below the argument that the RICO "pattern" element is unconstitutionally vague.

Respondents assert that petitioners' argument that RICO's "pattern of racketeering activity" element is unconstitutionally vague was "never presented to the Court of Appeals" (P&G Br. 15). On the contrary, this argument was made to the Court of Appeals in the petition for rehearing submitted by petitioners Big Apple Industrial Buildings, Inc., Arol I. Buntzman and Martin William Halbfinger, Esq. (the "Big Apple petitioners").

Moreover, prior to that petition, this argument would have been premature, as it was not then clear that this Court was unable to give sufficient meaning to the "pattern of racketeering activity" element of a RICO claim to give constitutionally required fair notice of proscribed activity. The vagueness in the "pattern" element as applied here only became crystallized after this Court's decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 916 (1989), which was decided after briefing to the Court of Appeals, but before the petition for rehearing was submitted by the Big Apple petitioners. Accordingly, this argument was not only raised in the Court of Appeals, but at the earliest appropriate time.

2. RICO is not rendered constitutional because the mail and wire fraud predicate acts are not vague.

Relying on *United States v. Seregos*, 655 F.2d 33, 36 (2d Cir. 1981), *cert. denied*, 455 U.S. 940 (1982), respondents claim that "fair notice challenges have been rejected where the presence of some other statute or parallel enforcement scheme unequivocably marked the defendant's conduct as wrongful, so that there was no doubt he had made a conscious decision to violate *some* law."

(P&G Br. 17).[1] This is a misreading of *Seregos*, which stands for no such sweeping proposition.

Rather, in *Seregos* the court rejected a claim of lack of fair notice that the Travel Act applied to commercial bribery because "there is nothing vague or indefinite about 'bribery' as used in the Travel Act." 655 F.2d at 36. More particularly, the court held that the notice provided was sufficient even if it was not clear whether the Travel Act applied to commercial bribery and bribery of a public official or only the latter. *Id.* In *Seregos*, defendant had violated the very law — bribery — as to which he was claiming a lack of fair notice.

Respondents' argument by analogy would be well taken if all that RICO required was multiple acts of mail and wire fraud — then the Big Apple petitioners would have had fair notice. That however, is not enough: a RICO violation requires a "pattern" of such activity. Unlike the defendant in *Seregos*, the Big Apple petitioners had no fair notice of an element of the proscribed conduct, that their alleged acts could constitute a "pattern" — a word that was shown in *H.J. Inc.* to be bereft of minimal constitutional standards of fair notice.

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1. *United States v. Ragen*, 314 U.S. 513, 524 (1942), also relied upon by respondents (P&G Br. 17-18), is simply irrelevant. There, a tax evasion statute was found not to be unconstitutionally vague first because it provided some standard, one of reasonableness, and second because the evidence of consistent conversion of profits to "commission" expenses made it clear that defendant was on notice that its conduct might violate the statute. Here, in contrast, there is no standard to measure the "pattern" element. *H.J. Inc.*, 1095 S. Ct. at 2909. *See, e.g., Collins v. Kentucky*, 234 U.S. 634, 638 (1914) (statute requiring defendant to know "real value" of goods held to be unconstitutionally uncertain because it prescribed no standard of conduct that was possible to know).

3. The Court's decision in *Fort Wayne Books, Inc.* is irrelevant here.

Respondents rely on *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989) in arguing that this Court has upheld the "pattern" element in the face of a vagueness attack (P&G Br. 18-19). In *Fort Wayne* however, this Court did not address the pattern requirement. Rather, the Court rejected the attack on the RICO statute for vagueness in its use of obscenity statutes as predicate acts. This Court simply upheld the constitutionality of the Indiana obscenity laws based on its previous decisions upholding obscenity laws (109 S. Ct. at 924), and specifically did not address the issue of the constitutionality of the "pattern" element. 109 S. Ct. at 925 n. 7. In short, the statute was not under attack because of the vagueness of the "pattern" element, and *Fort Wayne* is thus inapposite.

CONCLUSION

The petition should be granted.

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